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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-22

AIR FREIGHT HAULAGE CO., INC.,

Petitioner,

against

RYD-AIR, INC., AIR CARGO, INC., RYDER SYSTEM, INC., AMERICAN AIRLINES, INC., EASTERN AIRLINES, INC., NORTHEAST AIRLINES, INC., AIR CANADA, ALLEGHENY AIRLINES, INC., BRANIFF AIRWAYS, INC., BRITISH OVERSEAS AIRWAYS CORP., DELTA AIRLINES, INC., FLYING TIGER LINES, INC., MOHAWK AIRLINES, INC., NATIONAL AIRWAYS, INC., NEW YORK AIRWAYS, INC., NORTHWEST AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AVIATION, INC., AIRLIFT INTERNATIONAL, INC., SEABOARD WORLD AIRLINES, INC., SOUTHERN AIRWAYS, INC., TRANS WORLD AIR LINES, INC., UNITED AIR LINES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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This Reply Brief is prompted by the impact of the Ninth Circuit's opinion in *Jim Cain* v. *Air Cargo, Inc.*, 599 F.2d 316 (9th Cir. 1979), decided June 26, 1979, which reached counsel only as the Petition was at press. Additionally, several misstatements in Respondents' Brief in opposition are clarified.

1. We believe *Cain* presents a head-on conflict between the Second and Ninth Circuits in the important areas of antitrust liability and antitrust immunity by virtue of regulation by the Civil Aeronautics Board ("CAB"). Moreover, we are morally certain Air Cargo, Inc. ("ACI") will petition this Court for certiorari in *Cain* on the authority of the Second Circuit's decision in the instant case. Ironically, the leading case law model for *Cain* was the Second Circuit's holding in *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 470 F.2d 767 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973). In *Cain*, Chief Judge Goodwin held:

> "In *Breen*, the ACI had refused to renew plaintiffs' contract. Instead, it awarded the sole contract for the area to a newly-formed corporation, Ryd-Air, in which ACI shared both the equity and the seats on the board of directors with a trucking competitor of plaintiffs. The Second Circuit held that the airlines' 1947 agreement did not empower ACI to organize and operate new firms, and hence that ACI was not acting as an agent of the airlines when it did so. Therefore, neither ACI nor Ryd-Air was an 'air carrier' under Section 412 and immunity did not attach. *See also Air Freight Haulage Co.* v. *Ryd-Air, Inc.*, 408 F.Supp. 446 (S.D.N.Y.1976); Note, Air Carriers—Anti-Trust Immunity, 39 J. Air L. & Comm. 453 (1973).
>
> ACI thus acted differently in *Breen* than it did in *Scroggins, Big Bear*, or *Air Freight Haulage of Puerto Rico*. In *Breen*, prior to awarding the contract, *ACI involved itself in the horizontal organization of the freight-hauling industry* by affiliating with plaintiffs' competitor to establish its own trucking firm. This distinguishes *Breen* from the other cases, where ACI was involved only vertically as the contract agent between the airlines and truckers. The cases together hold that while ACI is free to award its contracts as it will, the CAB approval under Section 412 does not extend to ACI's activities to affect the organization of the trucking industry itself. Section 414 cannot immunize conduct that is not contemplated by the agreement that the CAB approved." *Id.*, 599 F.2d at 319 (emphasis added).

Beyond the *horizontal* interference with the trucking industry decried by both *Breen* and *Cain*, it is apparent that quite a chasm exists between the concepts of the governing relevant market, implied but nowhere mentioned in *Breen*, but deemed dispositive by the District Court opinion herein:

> "The relevant product market in this case is the ground transportation of air freight to and from the metropolitan New York airports. The testimony establishes that this service is provided, without significant differences, by air freight forwarders, independent contractors, house truckers, as well as ACI" (Petition 6a).

and the conflicting premise of the Ninth Circuit's decision in *Cain*.

For in the *Cain* case, it is obvious that the Ninth Circuit's view of the relevant market contemplated trucking to and from the airport *only* of goods to be shipped by air under direct contract between an *airline* and the actual shipper (with the airlines automatically using the ACI truckers for pick-up and delivery). Nowhere does *Cain* mention the only competing *air* carriers of the airline operators, namely, the CAB-licensed air freight forwarders. Rather, *Cain* held:

> "Award of an ACI contract does not guarantee to a contractor all of the trucking business incident to *airline freight carriage*. To arrange shipment of his goods to the airport, a shipper is free to call local

carriers [truckers],* like plaintiffs, who do not have an ACI contract. *If* the shipper calls an *airline* to arrange shipment, however, *the order is routed through ACI to its designated carrier* [trucker]. When the goods arrive at the destination airport after air shipment, they will be delivered locally by the ACI carrier [trucker] at the other end, except in the *rare* case where the shipper has arranged for a different local trucker to pick up the goods in the destination city.

The ACI contract thus ensures for its holder a large volume of airport hauling. In the instant case, for example, ACI until 1975 had contracts for cartage in the closest zones surrounding Los Angeles International Airport with two truckers, City Freight and Atlantic Transfer Company ('Atlantic'). The contracts, plaintiffs assert, gave the two companies a total of almost *100 percent* of the hauling from the airport and *80 percent* of the cartage to the airport related to air shipment. The independent truckers with whom City Freight and Atlantic competed, such as plaintiffs here, together had the other 20 percent of the business going to the airport." 599 F.2d at 317-18 (emphasis added).

The Ninth Circuit did not elect to express disagreement with the instant case (footnote 8, 599 F.2d at 320). Nevertheless, the disparate elements making up the District Court's "relevant market" in this case (now adopted in the Second Circuit's affirmance), can never be reconciled with the Ninth Circuit's definition, above quoted, of that market as "trucking business incident to airline freight carriage". For into the Second Circuit's relevant market, as defined in that portion of the trial judge's opinion quoted

* The opinion used the word "carrier" interchangeably with "trucker". The bracketed equivalent is inserted for clarification.

at page 3 hereof, is jumbled 1) "air freight forwarders" who are no more "truckers" than the other *air* carriers—the airline operators—with which they compete in the two discrete submarkets for the domestic carriage of air cargo; 2) "independent contractors", meaning such non-ACI truckers as may be hired by a *shipper* to effect the pick up or delivery (whether regular or casual); 3) "house truckers", who are only part of a shipper's facilities and who cannot constitute a "market"; and finally, 4) "ACI" itself which either oversees or does *all* of that pick up and delivery service which its *airline* principals—omitted from inclusion in the "relevant market" unlike their air freight forwarder counterparts—contract to provide *as incident to their actual air carriage.* Ominously, given such usage as the Second Circuit now sanctions, "relevant market" becomes a tool for diluting illegal market restraints beyond their actual operational areas, thereby legitimizing them and putting them beyond remediation.

The Second Circuit's conception of the relevant market is not a mere finding of "fact," as respondents claim (Brief, p. 4). Rather, the determination of relevant market in this case is an ultimate conclusion of *law*, subject to this Court's scrutiny. *United States* v. *Connecticut National Bank*, 418 U.S. 656, 667 (1974). In many antitrust cases pressing for the attention of this Court, the issue of relevant market is the central *law* issue presented.

2. Respondents take the Petitioner to task for injecting "red herring" issues, which they claim were not stated in the Pre-trial Order (Brief, p. 6). That criticism comes with bad grace from parties who first raised one of the main issues of the case—relevant market—at trial, without bothering to give the notice and warning against surprise intended by pre-trial orders. In any event, Respondents' frivolous claim that the price-fixing violation was not properly raised below is belied by the explicit allegations of paragraph seventeen of the Amended Complaint and para-

graph two of the Pre-Trial Order (explicitly raising price-fixing), as well as by the trial testimony going directly to the point and also by pre-marked documentary exhibits. Indeed, when Petitioner briefed the matter in a post-hearing memorandum, Respondents did not claim surprise or lack of notice.

In keeping with Respondents' distortion of the case presented below is their attempt to mislead this Court into believing that ACI rates are submitted to the CAB for surveillance and review (Brief, p. 7n). In fact, the industry-wide rate-fixing engaged in by Respondents ACI, Ryd-Air and the airlines in 1970 was *never disclosed* to the CAB.

3. Patently, this case is more than an attempt by Petitioner to have this Court review "findings of fact by two courts below" (Respondents' Brief, p. 4). As this Court said in *United States* v. *General Motors Corp.*, 384 U.S. 127, 141n (1966), regarding a claim of group boycott under Section One of the Sherman Act,

> "We note that, as in United States v. Parke, Davis & Co., 362 U.S. 29, 44-45, the ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act, is not to be shielded by the 'clearly erroneous' test embodied in Rule 52(a) of the Federal Rules of Civil Procedure. . . . As in Parke, Davis, supra, the question here is not one of 'fact', but consists rather of the *legal standard* required to be applied to the undisputed facts of the case." (emphasis supplied).

We feel that the very real and serious issues in this case, viewed alone or with other antitrust cases presenting similar issues, ought to be reviewed and resolved by this

Court. We respectfully renew our prayer that a Writ of Certiorari be granted herein.

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August 31, 1979

Respectfully submitted,

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